TO BE OR NOT TO BE SELF-RESTRAINT? THE ROLE OF THE CONSTITUTIONAL COURTS IN SHAPING THEIR POWERS AND THE CONSEQUENCES ON CONSTITUTIONAL REFORM[1]

DOI:10.47743/rdc-2022-2-0005

Professor ***PhD Marieta SAFTA****

Abstract

The practice of constitutional courts worldwide reveals the growing importance they have on the evolution of constitutions through jurisprudential interpretation. From the "drawing" of some implicit limits of the amendment of the constitutions, as in the basic structure theory found in some constitutional systems, to the defining the fundamental rights, deduction of the procedures applicable in concrete situations not foreseen by the constituent legislators, or the strict staking of the legislation that we identify in other systems, constitutional courts are increasingly active in saying what the Constitution is. Starting from the concrete example of the Romanian Constitutional Court and its evolution within multilevel constitutionalism specific to the European Union, this study proposes a debate on the interpretation that the Constitutional Courts give to their own powers established by the Constitution. In the framework of the specific relationship between Courts in the European Union, this debate has a particular side, meaning the drawing of the limits of competence between the constitutional courts of the Member States and the Court of Justice of the European Union. However, the debate is of general interest because the observance of the limits of competence of public authorities and, from this perspective, the definition of these limits is a fundamental component of the rule of law. Expanding or not the powers of the constitutional courts and the way to achieve this objective is, in our opinion, a key issue of constitutional reform.

Keywords: *constitutional courts, constitutional justice, constitutional review, judicial activism*

[1] Paper presented at the World Congress of Constitutional justice, Johannesburg, 5-9 December 2022.

* Titu Maiorescu University Bucharest, Faculty of Law, Romania.

I. Introduction

The evolution of the constitutional justice at the global level illustrates a tendency to increase the role and responsibilities of courts entrusted with the complex task of guaranteeing the supremacy of the Constitution. The most recent Congress of the World Conference on Constitutional Justice, held in Bali in October, hosted by the Constitutional Court of Indonesia, concluded, among other things, that "the broader a constitutional court's competences, the greater contribution to social peace. Relevant competences include the review of the Constitutionality of norms, the settlement of disputes between bodies of the state and ensuring the regularity of electoral processes"[2].

Ideas like extended powers, a strengthened role of constitutional courts, the effectiveness of constitutional justice are expressed in various meetings and formats of representatives of constitutional courts.

These objectives can be achieved, first and foremost, through amendments to the legislation.

The Constitutional Court of Romania (CCR) itself is a suggestive example in this regard. On the occasion of the only revision of the current Constitution, which was carried out in 2003, the CCR's status was significantly strengthened. Thus, the general binding nature of its decisions was expressly regulated, a controversial effect up to that point (in the sense of assigning, in some opinions, a binding inter partes litigantes rather than erga omnes). The possibility for the Parliament to adopt in the same form, by a majority of at least two thirds of the members of each House, a law that has been established, a priori, unconstitutional has been abolished. Also, new powers were regulated, namely the constitutionality review of international treaties and the settlement of legal conflicts of a constitutional nature, being also provided for the possibility of introducing new attributions by the law on the organisation and functioning of the Court. New powers were then introduced in 2004 (the review of the law on revision of the Constitution adopted by the Parliament) and in 2010 (the constitutional review of the decisions of the plenum of the Chamber of Deputies, the Senate, the Joint Chambers of the Parament).

However, what can be seen, following the developments of constitutional justice, is that even constitutional courts are 'architects', sometimes very zealous of their own powers and competences. Therefore, we can speak of more activist courts and more reserved courts or more activist or restraint periods in their history.

In the cooperation structures of the constitutional courts at regional and international level these developments are noted and debated, occasion of mutual "!inspiration" and uniformity of approaches at global level.

Thus, for example, the theme of the XIVth Congress of the Conference of European Constitutional Courts held on 2-*7* June 2008 in Vilnius was *Problems of legislative*

[2] See Press Release https://www.venice.coe.int/files/2022_10_06_WCCJ5_Bali_Communique-E.PDF.

omission in constitutional jurisprudence. This topic refers to a 'reinterpretation' of the classical competence of constitutional courts by simple 'negative legislators'. This development is due to the constitutional courts themselves because they have proceeded through case-law to this reinterpretation. It is no longer a surprise, for example, that the courts sanction the 'silence of the law' and oblige the legislator to adopt regulations that meet its constitutional obligations.

A few years ago, in a conference of constitutional courts on the topic of *Judicial Activism of Constitutional Courts in a Democratic State*, hosted by the Constitutional Court of Latvia[3], it was highlighted in this regard that "the special role of the constitutional courts in a democratic state, on the one hand, and the complex nature of the cases under review of the constitutional courts, on the other hand, may make these courts depart from the classical Kelsenian concept of constitutional review". It was emphasized that Constitutional courts "by manifesting certain judicial activism, cause discussions about their place within the system of separation of powers. In other words, it is more and more often that constitutional courts give direct guidance to the legislator on how to prevent the incompatibility of the contested legal norms with the constitution. This may be seen as the narrowing of the legislator's discretion. Therefore, it is important to ascertain the need for judicial activism of constitutional courts, and to outline its form, content and limits. This would prevent an unjustified interference with the competence of the legislator, while simultaneously ensuring the supremacy of the constitution. This would also promote a constructive dialogue between the constitutional court and the legislator".

What is the most suitable attitude for a constitutional court, to be more activist or more restraint? This is the topic of the debate which keeps its relevance

Although I will refer as a case study to the Constitutional Court of Romania, the debate is of general interest because the observance of the limits of competence of public authorities and, from this perspective, the definition of these limits is a fundamental component of the rule of law. Expanding or not the powers of the constitutional courts and the way to achieve this objective is, in our opinion, a key issue of constitutional reform. Moreover, radical accents or overruns of jurisdiction can cause tensions even between courts, especially in a system of multi-level constitutionalism, such as that of the European Union. In this respect, at the same Conference on Judicial Activism it was shown that "when the judicial activism and judicial restraint of constitutional courts are discussed, what is typically examined is the relationships of the courts with the legislator; however, today the debate on the judicial activism and restraint in the relationships between the constitutional courts and the European courts is no less relevant. Similarly to the relationships between the constitutional court and the legislator, where a continuous dialogue takes place and where the involved parties have a defined sphere of competence, it is also important in the interests of the European

[3] https://www.satv.tiesa.gov.lv/en/2016/02/17/judicial-activism-of-constitutional-courts-in-a-democratic-state/.

integration to respect the competencies vested in the European courts and in national (constitutional) courts and to promote a constructive dialogue between the national and the supra-national as well as the national and the European judicial actors"[4].

II. Brief presentation of the Constitutional Court of Romania (CCR) and its powers

The Constitutional Court of Romania is organised according to the Kelsenian model of constitutional justice, and its powers are regulated by the Constitution (Article 146) and Law no. 47/1992 on the organisation and functioning of the Constitutional Court, subsequently amended and supplemented.

Article 146 of the Constitution provides for a number of 11 texts [la)-k] including the powers that form the tough core of competence, intangible for the legislature. It may be added to this possibility provided for in subparagraph l) of Article 146 of the Constitution, which states that the Organic Law of the Constitutional Court may also establish other powers.

They can be classified, according to the content criterion, into two broad categories: those concerning the constitutional review of certain normative acts and those concerning to the constitutional review of certain activities, behaviours, attitudes.

The first category includes the powers following: it adjudicates on the constitutionality of laws before promulgation [a) first sentence]; it adjudicates, ex officio, on any initiative purporting a revision of the Constitution [a) second sentence] and on the bill for revision adopted by Parliament (Article 23 of Law no. 47/1992); it adjudicates on the constitutionality of treaties or other international agreements [b)]; it adjudicates on the constitutionality of the Standing Orders of Parliament [c)]; it adjudicates on the Constitutionality of the rulings of the Plenum of the Chamber of Deputies, of the Senate or of the two Chambers of Parliament [l)]; the same rules as for the power regulated by Article 146 c) of the Constitution; it rules on objections as to the unconstitutionality of laws and ordinances which are raised before the courts of law or commercial arbitration [d) first sentence]; it rules on objections as to the unconstitutionality of laws and ordinances which are brought up directly by the Advocate of the People [d) second sentence].

The second category includes the following powers: it decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of magistracy [e)]; it sees to the observance of the procedure for the election of the President of Romania and confirms the ballot returns [f)]; it ascertains any circumstance as may justify the interim in the exercise of

[4] Ibidem.

the office of President of Romania, and it reports its findings to Parliament and to Government [g)]; it gives advisory opinion on the proposal to suspend the President of Romania from office [h) first sentence]; it sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns [i)]; it verifies whether conditions are met for the citizens' exercise of their legislative initiative [j)]; it rules on challenges as to the unconstitutionality of a political party [k)].

According to Article 3 of Law 47/1992 on the organisation and functioning of the CCR, *"(1) The powers of the Constitutional Court are those laid down by the Constitution and by the present law. (**2) In the exercise of its powers, the Constitutional Court shall be the only authority entitled to decide upon its competence**. (3) The competence of the Constitutional Court, as established in accordance with paragraph (2) above, cannot be contested by any public authority*"[5].

III. The initiatives of the revision of the constitution and the perspective of the Constitutional Court of Romania on its competence

1. General remarks

One of the most evident ways in which constitutional courts can contribute to "modelling" their powers and competence is when ruling on constitutional amendments.

In Romania, the constitutional review is mandatory in the revision procedure of the Constitution and its object is the verification of the observance of the procedure and the limits of the revision, expressly regulated in the Constitution (Articles 150-152). CCR will rule *ex officio* on the revision initiatives of the Constitution, as well as on the revision law adopted by the Parliament, thus "securing" the core of democratic values of Romania: *(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof*[6].

The decisions of the Court should be generally binding, so that a revision initiative/revision law of the Constitution found unconstitutional will not be able to be adopted by the Parliament and, namely, not subject to the referendum for the revision of the Constitution. Even if, in the exercise of this attribution, the extent of the Court's Competence is precise (it only verifies compliance with the revision procedure and compliance with the limits of the revision of the Constitution), the Court

[5] https://www.ccr.ro/en/legal-basis/.
[6] https://www.presidency.ro/en/the-constitution-of-romania.

often also introduces a series of recommendations in its decisions concerning the legislative solutions. Examining the initiatives to amend the Constitution since 1991 (when the current Romanian Constitution was adopted) till now (a total of 10 initiatives of which only one was successful in 2003), we note that the CCR has ruled, by adopting a more activist or more restraint attitude, on the reconfiguration of its attributions[7].

2. A self-restraint perspective

This approach is evident in the decision on the 2003 revision initiative[8] (the only successful one), when the Constitutional Court of Romania ruled strictly circumstantiated its new power to resolve legal conflicts of a constitutional nature. The Court noted that "*in order to avoid engaging the Court in resolving political conflicts, it is necessary to provide that these are only institutional blockages, namely positive or negative conflicts of competence*".

This recommendation is also found later, in Decision no. 799/2011[9], on an initiative to revise the Constitution which was not finalised. On that occasion, the Constitutional Court noted that "*it considers necessary to reassess this power in the sense of circumscribing the concept of 'legal conflict of a constitutional nature' only with regard to conflicts between public authorities that 'involve concrete acts or actions by which one or more authorities arrogate powers, attributions or competences, which, according to the Constitution, belong to other public authorities, or the omission of certain public authorities, consisting of declining competence or refusing to perform certain acts that fall within their obligations'".*

As can be seen from the reading of the current constitutional provisions, the legislator has not realised this circumstantiating. This enabled the Court, in other subsequent compositions, to give an increasingly broad/generous interpretation to its competence in the exercise of that power, which has attracted criticisms[10].

Also in 2003, the Constitutional Court ruled against the regulation in the Constitution of the possibility to acquire other powers of the Court by organic law. The Court found that "*this proposal is to be eliminated in order to preserve the political neutrality of this public authority and to comply with the will of the original constitutional power*". The recommendation was resumed in 2011 (Decision no. 799/ 2011) when the Constitutional Court of Romania held that, on the basis of the

[7] M. Safta, Report Romania – Barroso, Luis Roberto and Albert, Richard, The 2020 International Review of Constitutional Reform (September 4, 2021). Published by the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism (ISBN 978-1-7374527-0-6), Available at SSRN: https://ssrn.com/abstract=3917596, pp. 244-248.

[8] Decision no. 148/2003, published in the Official Gazette no. 317 of 12 May 2003.

[9] Published in the Official Gazette no. 440 of 23 June 2011.

[10] See, as an example, V. M. Ciobanu, Curtea Constituțională – garant al supremației Constituției, putere legiuitoare sau expert parlamentar?, în RRDP nr. 3/2009, p. 72-95.

constitutional text allowing such a possibility, *"the powers of the Constitutional Court can be multiplied whenever the interests of the political forces require the amendment or completion of the law on the organisation of the Court. The Court considers that, by abolishing the constitutional provision (n*.n. allowing the introduction of new powers by organic law*), the independence of the constitutional court is guaranteed and the will of the original constitutional power with regard to the Court's powers limitedly provided for only in the Constitution is guaranteed".*

As can be seen from the reading of the current constitutional provisions, the derived constitutional legislator did not comply with this recommendation of the Court. It allowed the introduction, over time, of two new powers of the Constitutional Court, one of which represented a real apple of discord, namely the constitutionality review of the Parliament's decisions. Thus, after the possibility of reviewing the Parliament's decisions was introduced by organic law, the legislator "reconsidered" this option. However, the subsequent attempt to 'withdraw' the latter power was found unconstitutional, being also criticised in an opinion of the Venice Commission: "*24. The Government Emergency Ordinance no. 38 of 4 July 2012 removes the competence of the Constitutional Court, introduced in 2010, to "cover the decisions of the Chamber of Deputies, of the Senate, as well as of the plenum of the two reunited Chambers" and leaves within the competence of the Court only "Parliament's regulations". The competence to control decisions of Parliament (for example on appointments or dismissals) was thus removed. (...) 27. To sum up, Ordinance no. 38 is problematic from a constitutional viewpoint because it affects the status of a fundamental state institution – the Constitutional Court – and the urgency of the measure has not been established. 28. By the reasoning of Decision no. 727 of 9 July 2012, the Constitutional Court had qualified the adoption of this Ordinance while a law with the same content was pending before the Court as "unconstitutional and abusive behaviour towards the Constitutional Court". As concerns the Law under review, the Court came to the conclusion that a removal of its competence to control parliamentary resolutions violated the rule of law and separation of powers (CDL-REF(2012)031, p. 29). 29. By Decision no. 738 of 19 September 2012, the Constitutional Court found the Law approving the Government Emergency Ordinance no. 38/2012 unconstitutional because the distinction made in the Law between parliamentary decisions, which concern Parliament's internal autonomy and those which concern individual acts, is redundant and because it Law restricts access to constitutional justice*"[11].

[11] Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania in Respect Of Other State Institutions and on the Government Emergency Ordinance on Amendment to the Law no. 47/1992 Regarding the Organisation And Functioning of the Constitutional Court and on the Government Emergency Ordinance on Amending and Completing the Law no. 3/2000 Regarding the Organisation of a Referendum of Romania Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)026-e.

Subsequently, on the occasion of another initiative to amend the Constitution in 2014, the Constitutional Court recommended to "constitutionalise" the two powers already introduced by organic law (the constitutionality review of the laws revising the Constitution and the constitutionality review of the Parliament's decisions), in the sense of being taken over in the very text of the Constitution, eliminating, for the future, the possibility of adding new powers by infra-constitutional law (Decision no. 80/2014[12]).

3. An activist approach

On the occasion of the examination of the initiative to amend the Constitution (Decision no. 799/2011), the Court itself suggested "*the introduction of a new power of the Constitutional Court, namely to rule, ex officio, on the constitutionality of the decisions of the High Court of Cassation and Justice by which it settles appeals in the interest of the law.* "*The Court pointed out that "the formulated proposal starts from the circumstance that, on the one hand, the resolution of the questions of law brought before the trial is binding on the law courts, and, on the other hand, according to the provisions of Article 124 (3) of the Constitution, judges are independent and are subject only to the law. (...) The Constitutional Court considers that the solutions given in the appeal in the interest of the law, binding on the law courts, adopted with a view to ensuring, interpreting and applying the law uniformly, must comply with constitutional requirements, meaning that their constitutionality needs to be reviewed".*

The legislator did not introduce this power of the CCR. However, in the exercise of the power of resolving the exceptions of unconstitutionality, the constitutionality review of laws and ordinances in the interpretation of the High Court of Cassation and Justice has been developed. This approach raises, in practice, problems of defining the limits of jurisdiction of the CCR in the exercise of this review (so as not to be converted into an appeal against the decisions of the HCCJ)[13].

IV. Trends and developments in other powers of the CCR

1. General remarks

It is also evident the role of "architects" of constitutional courts when interpreting the extent of their competence in the exercise of the constitutional powers entrusted them.

[12] Published in the Official Gazette no. 246 of 7 April 2014.

[13] T. Toader, M. Safta, Admisibilitatea excepțiilor având ca obiect constituționalitatea normelor juridice în interpretarea dată prin recursul în interesul legii sau hotărârea prealabilă pentru dezlegarea unor chestiuni de drept, în volumul Conferinței internaționale de drept, studii europene și relații internaționale, ed. a III-a, cu tema "Perspectivele dreptului național și european în contextul provocărilor complexe al societății contemporane", Universitatea Titu Maiorescu – Facultatea de Drept, București, 12-13 mai 2016.

It is notable in this respect the development, in the CCR's case-law, of a genuine doctrine of the 'cases of inadmissibility' of the referrals, namely of those cases that prevent the CCR from investing and resolving the substance of the referrals with which it is invested. There is a rich case-law in this regard, in which the Court distinguishes between its competence, on the one hand, and that of the legislator or of the courts of law, on the other. The assessment of these cases of inadmissibility hovers over time and even in the same period of time, depending on the belief/convictions of the judges composing the Court at a given time. In practice, it outlines a more activist or more restraint profile of the Court, or genuine 'schisms' within the Court in the sense of shaping a trend contrary to the majority, expressed in separate opinions raising the question of the extent of the competence of the constitutional court[14].

We will point out examples that concern only the powers of the constitutionality review of the laws prior to promulgation, the constitutionality review of laws and ordinances by way of exceptions of unconstitutionality and the resolution of legal conflicts of a constitutional nature.

2. Constitutional review of laws before promulgation

A cause of inadmissibility developed through case-law and reflecting the evolution in the sense of a more restrictive approach is the one according to which laws may be challenged before promulgation, but only if the referral was formulated within the promulgation period of the law. In this way, the Constitutional Court of Romania aimed to prevent its repeated referral, "in cascade", on the same law adopted by the Parliament, a practice likely to block the promulgation and, subsequently, the publication and entry into force of the law. The Constitutional Court therefore noted that "***a contrary interpretation***, *based on the idea that there is no deadline for bringing proceedings before the constitutional court,* would lead to the conclusion that the formulation of a referral of unconstitutionality, which leads to the interruption of the promulgation period, ***creates a situation in which the subjects of law referred to in Article 146 a) of the Constitution may refer to the constitutional court sine die,*** depriving of legal and constitutional effects the legal and constitutional provisions relating to the time limits for the exercise of procedural rights before it. It could lead to the situation where *the holders of the right to hearing would alternatively and successively formulate, for identical or different reasons, an unlimited number of unconstitutionality objections regarding a certain law, circumstance that would impermissibly prolong the legislative procedure,* indirectly blocking the completion of this procedure and, therefore, the entry into force of the act adopted by the Parliament. Or, according to the settled case-law of the Constitutional Court, the establishment by law of time-limits is only for the purpose of disciplining the legal relationships

[14] See E S Tanasescu, On separate opinions and their impact on constitutional courts, https://www.juridice.ro/essentials/4385/on-separate-opinions-and-their-impact-on-constitutional-courts.

between the parties and preventing abusive, punitive conduct of the holders of the right for which the obligation to comply with those deadlines is imposed". (Decision no. 67/2018[15]).

It should be noted that the constitutional text governing this power refers only to the condition that the contested law has not been promulgated, and until 2018 the CCR checks only this condition, without examining the deadline within which the referral was made. In this respect, there is the separate opinion of the 2018 Decision[16]: "*The right to refer the matter to the Constitutional Court within the framework of the constitutional review a priori is a fundamental one, enshrined in the provisions of Article 146 a) of the Constitution for certain entities with a well-defined role in the constitutional architecture of the rule of law. The deprivation of the holders of this right to exercise it specifically, solely on the grounds of exceeding the 20-day time-limit laid down in Article 77 (1) of the Constitution – time-limit which is not opposable to them, established by the constituent legislator exclusively for the President of Romania in the procedure of promulgation of the law, a time-limit arbitrarily chosen, in the present case, by the constitutional court as the deadline by which the holders of the right of appeal provided for in Article 146 a) of the Constitution may formulate referrals of unconstitutionality – it has no constitutional support and would mean a denial of their right of access to constitutional justice".*

3. Constitutional review of emergency laws and ordinances by way of exceptions of unconstitutionality

Being the most consistent in terms of volume attribution of the Constitutional Court of Romania (approximately 80 % of the number of cases registered before the Constitutional Court of Romania), this is also the most significant for modelling/ remodelling its own competence, and the influence that the Court, in various configurations, has in relation to this remodelling.

For instance, the period 2018-2021 was representative of the divergence of opinions between the CCR judges, marked by a higher than usual number of separate opinions in which it was pleaded for a more restraint attitude of the CCR, in the sense of not replacing the legislator or the courts of law, or even violating the competence of a supranational court such as the CJEU[17].

One of the strongest was the separate opinion formulated in a case in which the Court, invested by the act of referral with the resolution of the exception of unconstitutionality of Article 140 (7) of the Criminal Procedure Code, according to which "*The decision by which the judge of rights and freedoms decides on technical*

[15] Published in the Official Gazette no. 223 of 13 March 2018.

[16] Ibidem, Signed by dr Livia Doina Stanciu.

[17] See also E.S.Tanasescu On separate opinions and their impact on constitutional courts, https://www.juridice.ro/essentials/4385/on-separate-opinions-and-their-impact-on-constitutional-courts.

surveillance measures is not subject to appeal", established that the object of the exception is, in reality, Article 145 of the Criminal Procedure Code, which reads as follows: *"(1) After the termination of the technical surveillance measure, the public prosecutor shall inform, in writing, no later than 10 days, each subject of a warrant of the technical surveillance measure that has been taken in respect of him. (2) After the information, the supervised person shall have the right to become aware, upon request, of the contents of the minutes in which the technical surveillance activities carried out are recorded. The public prosecutor must also ensure, upon request, that the conversations, communications or discussions are heard or the images resulting from the technical surveillance activity are viewed. (3) The deadline for submitting the* application shall be 20 days from the date of communication of the written information *referred to in paragraph (1). (4) By giving reasons, the prosecutor may postpone the performance of the information or presentation of the media on which the technical surveillance activities are stored or of the playback minutes, if this could lead to: a) disrupting or endangering the proper conduct of the criminal prosecution in question; b) endangering the safety of the victim, witnesses or members of their families; c) difficulties in the technical supervision of other persons involved in the case. (5) The postponement referred to in paragraph (4) may be ordered at the latest until the end of the criminal investigation or the closure of the case*". (Decision no. 244/2017[18]).

The CCR motivated the circumstantiating of this object of the exception in the sense that "as regards the determination of the object of the exception of unconstitutionality, the Court finds that, in its case-law, it has held as a principle that, in carrying out the constitutional review, the constitutional court must take into account the real will of the party who raised the exception of unconstitutionality, otherwise the Court would be bound by a strictly formal procedural criterion, namely the formal indication by the author of the exception of the contested text (in this respect, Decision no. 775 of 7 November 2006, published in the Official Gazette of Romania, Part I, no. 1.006 of 18 December 2006; Decision no. 297 of 27 March 2012, published in the Official Gazette of Romania, Part I, no. 309 of 9 May 2012)".

In the separate opinion[19] it has been stated that "regardless of the possible correctness of the arguments put forward in that decision for the support of the unconstitutionality of the provisions of Article 145 of the Criminal Procedure Code, exception practically raised and motivated by the Court itself (as long as neither the court, nor the prosecutor, as author of the exception, nor the parts of the substantive file, nor any authority has been consulted and has not stated its point of view in this regard), there cannot be supported the solution of admitting this exception of unconstitutionality, since its acceptance would mean a circumvention of the entire constitutional and legal framework which configures the constitutionality review by

[18] Published in the Official Gazette no. 529 of 6 July 2017.
[19] Signed by dr Livia Doina Stanciu.

way of exception. According to that judge, compliance with that framework constitutes a guarantee that the Constitutional Court fulfils its constitutional role. The judicial activism and arguments that could support an activist attitude cannot constitute reasons, arguments for the creation, through case-law, of a substantially different framework for solving the exception of unconstitutionality, i.e. for the "construction", practically, through steps taken through case-law, of the referral ex officio with exceptions of unconstitutionality of laws and ordinances.

Another strong separate opinion, citing the *ultra vires* action of the Constitutional Court of Romania, was made at Decision no. 390/2021[20]. The main issues raised were:

a) jurisdictional interference, an aspect characterised in the dissenting opinion to this decision[21] as follows:

"*5. Beyond monist, dualist or pluralist positions regarding the system relationships between EU law and the national law of the Member States, as well as beyond the distinctions that can be made between the supremacy of the Constitution within any national normative system and the priority of application or the prevalence of EU law in relation to any normative provisions – including those of a constitutional nature – from the national law of the Member States, in the present case it should be noted that the CJEU analysis refers to EU law, and the CCR analysis refers to the Constitution of Romania.* ***That is precisely why the Constitutional Court of Romania acted ultra vires when, not being notified by the court that correctly submitted the exception of unconstitutionality to the CCR and the preliminary questions to the CJEU, it launched into assessments regarding the power of the supranational jurisdiction*** *(see also the Decision of the Constitutional Court no. 137/2019, published in the Official Gazette of Romania Part I, no. 295 of 17 April 2019)*".

b) the idea that a national court does not have the power to examine the conformity of a provision of national law, which has already been found to be constitutional, with the provisions of EU law[22].

In the same Decision no. 390/2021, the Court established, for the first time, the content of the Romanian constitutional identity, by referring to the provisions of Article 152 of the Constitution of Romania (limits of the revision of the Constitution), which emphasise the so-called eternity clause. Article 152 stipulates a series of values, principles that cannot be amended, such as "the" national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of justice, political pluralism and official language, respectively "no revision shall be made if it results in the suppression of the citizens' rights and freedoms, or of the safeguards thereof". The Court refers to those

[20] Published in the Official Gazette no. 612 of 22 June 2021.

[21] Signed by Professor PhD Elena-Simina Tănăsescu and dr. Livia Doina Stanciu.

[22] Judgment of 8 June 2021, in which the RCC rejected the findings of the European Court of Justice in its preliminary ruling of 18 May 2021.

constitutional values and principles as representing the "fundamental identity core of the Romanian Constitution".

On the other hand, the CJEU, in RS case, in its Judgment of 22 02.2022, ruled that "*If a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid (see, to that effect, judgments of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452, paragraph 20, and of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 96)". (par. 71)*

This is how, in a system characterised as being of multi-level constitutionalism, establishing the extent of competences through case-law can create tensions and raise the question of how they must be managed and resolved.

4. Settlement of legal conflicts of a constitutional nature

Since the Romanian Constitution and Law no. 47/1992 on the organisation and functioning of the Constitutional Court continue to use the phrase "*legal conflict of a constitutional nature"* without defining it, the determination of the features of the content of the legal conflict of a constitutional nature at the discretion of the Constitutional Court of Romania.

Thus, over time, the limits of competence of the Court in the resolution of legal conflicts of a constitutional nature have become increasingly larger.

In this regard, according to the case-law of the Constitutional Court:

– the legal conflict of a constitutional nature involves concrete acts or actions by which one or several authorities arrogate powers, attributions or competences which, according to the Constitution, belong to other public authorities or the omission of public authorities, consisting of declining competence or refusing to perform certain acts falling within their obligations (Decision no. 53 of 28 January 2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005);

– the legal conflict of a constitutional nature exists between two or more authorities and may concern the content or extent of their powers arising from the Constitution, which means that they are conflicts of competence, positive or negative, and which may create institutional blockages (Decision no. 97 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 169 of 5 March 2008);

– the text of Article 146 (e) of the Constitution "establishes the competence of the Court to resolve, in substance, any legal conflict of a constitutional nature between public authorities and not only conflicts of jurisdiction arising between them" (Decision no. 270 of 10 March 2008, published in the Official Gazette of Romania, Part I, no. 290 of 15 April 2008);

– legal conflicts of a constitutional nature "are not limited only to conflicts of competence, positive or negative, which could create institutional blockages, but concern any conflicting legal situations the birth of which resides directly in the text of the Constitution." (Decision of the Constitutional Court no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009, Decision no. 1525 of 24 November 2010, published in the Official Gazette of Romania, Part I, no. 818 of 7 December 2010, Decision no. 108 of 5 March 2014, published in the Official Gazette of Romania, Part I, no. 257 of 9 April 2014, Decision no. 285 of 21 May 2014, published in the Official Gazette of Romania, Part I, no. 478 of 28 June 2014, Decision no. 685 of 7 November 2018, published in the Official Gazette of Romania, Part I, no. 1021 of 29 November 2018, par. 120, or Decision no. 26 of 16 January 2019, published in the Official Gazette of Romania, Part I, no. 193 of 12 March 2019, par. 126);

– the admissibility of requests for the settlement of legal conflicts of a constitutional nature is not conditioned by the existence of 'institutional blockages'. The evolution of this case-law, determined by the complexity of the legal relations of constitutional law and the problems arising therefrom, on which the constitutional court has been called upon to rule, has led to the finding that the phrase '*legal conflicts of a constitutional nature'*, contained in Article 146 e) of the Constitution, refers to any conflicting legal situations the origin of which resides directly in the text of the Constitution. (Decision no. 85/2020, par. 84)[23].

V. Conclusions

The intention of this approach is to reflect and invite to debate on the extent of the powers of the constitutional courts and the way in which they are continuously shaped by the will of the courts, or majorities that are formed within the court at some point. From this perspective, the issue of judicial activism remains open, revealing new dimensions of debate, such as that of the tensions between courts, vertically or even horizontally, when the competences of the various categories of courts collide.

An interesting topic for further studies, related to the subject of our approach concerns the "history" of the regulations of the diciplinary liability of the judges from ordinary courts in Romanian legislation.

In 2012 was introduced the sanction for non-compliance with the decisions of the CCR (compulsory according to the Constitution) and of the CJEU (compulsory under EU law) in 2012. At that time, before the criticism of the law introducing the measure, the CCR asserted the following: "*with reference to both categories of decisions, the*

[23] T. Toader, M. Safta, Dezlegările date conflictelor juridice de natură constituțională, https://www.juridice.ro/essentials/2169/dezlegarile-date-conflictelor-juridice-de-natura-constitutionala.

Court finds that they give expression to a specific competence strictly provided for by law. Therefore, contrary to the assertions made by the referral, compliance with them does not prevent the exercise of the legal powers of law courts. In order to rule, law courts must consider and apply both the provisions of domestic law and the international treaties to which Romania is a party, according to the distinctions imposed by the provisions of Articles 20 and 148 of the ***Constitution****. However, the law courts' judgment always takes place on a specific case; the procedural framework specific to each case determines, each time, the proper interpretation and application of the relevant provisions. Furthermore, these criticisms, which are based on the premiss of errors of judgment which the two courts may commit in their decisions, concern, in essence, the very constitutional provisions which make those decisions binding. However, it is inadmissible that the Constitution itself should be criticised on the basis of a referral of unconstitutionality"*[24]*.*

After almost a decade, in 2021, the evolution of the CCR and CJEU case-law and the tensions in the sphere of jurisdiction of the two courts have made it difficult for ordinary court judges.

The positioning of the Romanian judges between the "hammer and the anvil", according to a famous popular Romanian expression, in the context of the tension between the CCR and the CJEU, and being held to obey both to the CJEU and CCR decisions under disciplinary sanctions, determined the formulation of new preliminary references to the CJEU.

In the C-430/21 RS EU, having as its subject-matter a request for a preliminary decision made on the basis of Article 267 TFEU by the Craiova Court of Appeal (Romania), in the procedure initiated by RS, the CJEU ruled that:

"1. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

2. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from

[24] Decision no. 2/2012, published in the Official Gazette no. 131 of 23 February 2012.

case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law"[25].

Recently, new laws of justice have been adopted in Romania, in which the disciplinary liability of judges for non-compliance with the CCR decisions is no longer found as separate offence. Called to rule on the constitutionality of the new laws, the CCR held that "*in examining the text of Article 271 of the criticised law, it is found that the failure to comply with the decisions of the **Constitutional Court** or the decisions given by the **HCCJ** in resolving appeals in the interest of the law was no longer regulated as a separate disciplinary offence in the text of the pre-referred law. However, this does not mean that failure to comply with them cannot give rise to disciplinary liability of the judge or prosecutor to the extent that it is demonstrated that he has exercised his office in bad faith or gross negligence*". (par. 139, Decision 520/2022[26]) So, this time, unlike 2012, we do not have a distinct disciplinary responsibility of magistrates for any non-compliance with the CCR decisions, but only as a general responsibility, in case of bad faith or serious negligence.

The subject deserves a closer analysis. However, is a need for caution in regulating and interpreting the powers of the constitutional and international courts and caution also for courts when the boundary of their competence is at stake. From this perspective, concerning whether judicial activism is an acceptable practice of courts, we think that a wise balance should be necessary: "the difference between the drug and the poison is in the dose. Or, as one of the preserved inscription in the Apollo Temple in Delphi (…) states – **Nothing in Excess**"[27].

[25] https://curia.europa.eu/juris/document/document.jsf;jsessionid=E891D6595DCB62D26DB3FC9E0B82C4FE?text=&docid=254384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2588220.

[26] Published in the Official Gazette no. 1100, 15 November 2022.

[27] See Dilyan Nachev – Judicial activism and the democratic legitimacy of Courts, in M. Belov (ed.) – The role of the Courts in Contemporary Legal Order, Eleven Internationl Publishing, p. 133-138.